Wood View Engineering Sdn Bhd v Lim Chan Kwang

HIGH COURT (KUCHING) — CRIMINAL APPEAL NO 11–09 OF 2005-III
DAVID WONG JC
28 OCTOBER 2005

Civil Procedure — Affidavits — Contents — Affidavit affirmed by solicitor — Non contentious affidavit — No lack of authority to affirm — Whether affidavit failed to comply with O 25 r 26 of Subordinate Court Rules 1980

Civil Procedure — Amendment — Delay in applying for amendment — Delay of four years from date statement of claim was filed — Amendments of details of cheques received — Whether application mala fide and defendant was prejudiced

Civil Procedure — Appeal — Interlocutory order — Whether interlocutory orders appealable — Subordinate Court Rules 1980 O 49 r 6(1) & Courts of Judicature Act 1965 s 3

The plaintiff had filed its statement of claim for a claim of RM13,000 for goods sold and delivered. Four years after the claim was filed, the plaintiff applied to amend the statement of claim to correct or amend the details of the cheques which were received by the plaintiff from the defendant. The magistrate dismissed the application relying heavily on the ground that there was no explanation for the delay of four years in making the application and hence the application was mala fide. The plaintiff appealed.

Learned counsel for defendant objected to this appeal on the ground that: (1) since the decision of magistrate was a decision which did not finally dispose the rights of the parties, there was no right of appeal; and (2) the affidavit in support of Tai Kie Mei (the plaintiff's solicitor) failed to comply with O 25 r 26 Subordinate Court Rules 1980 ('the SCR').

In respect of the affidavit, learned counsel for the plaintiff submitted it was a non issue as the plaintiff's solicitor had been duly authorized by the plaintiff to affirm on their behalf and had been further confirmed in the affidavit of Jong Kuet Thai, a director of the plaintiff.

Held, allowing the appeal:

(1) When a solicitor affirms something, which is not contentious (as was here), the only thing the opposing side has to worry about is his authority to affirm. Unless there is evidence that the solicitor has no authority there should be no

controversy about the affidavit. Here not only there was no evidence of a lack of authority, the solicitor's affidavit was confirmed by a director of the plaintiff company. Accordingly, the defendant's complaint on the affidavit was dismissed (see para 6).

(2) The operative words in O 49 r 6(1) of the SCR are 'any decision other than a decision made after trial by the court' which can only refer to interlocutory orders. Order 49 r 6(1) is a special provision for appeals against interlocutory orders of magistrates and sessions court judges which is to lie to a judge in chambers as opposed to appeals against decisions of the subordinate courts after trial which is to lie to a judge in open court. Order 49 r 6(1) obviously provides for an appeal to a judge in chambers of the High Court against an interlocutory order of the sessions court. Since both O 49 r 6(1) of the SCR and O 56 r 1(1) of the Rules of the High Court 1980 are special provisions, their provisions must prevail over the 'decision' as defined under s 3 of the Courts of Judicature Act 1964 ('the CJA'), and as such, the definition has no application to the 'decision' under those two orders (see para 11); *Thong Guan Construction Sdn Bhd v Shencourt Properties Sdn Bhd* [2000] MLJU 685; [2001] 5 CLJ 244 followed;*United Orix Leasing Bhd v Kilang Papan Agathis Sdn Bhd & Ors* [2003] MLJU 648; [2004] 1 CLJ 423 not followed. Furthermore, the amended O 49 r 6(1) came into effect in September 2000, which was after the 1998 amendment to s 3 CJA. One could safely assume that the framers of the amended O 49 r 6(1) were aware of the existence of s 3 CJA and would not put in a rule, which would be useless in the face of s 3 CJA. The defendant's preliminary objection was dismissed (see para 14).

(3) The plaintiff's application was not one of bad faith and ought to be allowed. In this case, the plaintiff merely wanted to correct the details of the amount paid to them by the defendant. There was no dispute to the amount paid. Plaintiff could have in its pleadings left out the details of the cheques and pleaded a sum RM24,500 had been paid by the defendant which would have been proper as there was no dispute to the amount paid. Late as it may be, the application was not a controversial one and had no effect on the claim itself (see para 19). Thus, there was no question of the defendant being prejudiced by the proposed amendments. Further, it has not been shown that the application was a tactical ploy by the plaintiff to delay the trial (see para 20); *Ribuwajar Development Sdn Bhd v Ratus Mayar Sdn Bhd* [2001] MLJU 693; [2002] 6 CLJ 56 followed.

[Bahasa Malaysia summary

Plaintif telah memfailkan penyataan tuntutannya untuk satu tuntutan RM13,000 untuk barangan yang dijual dan dihantar. Empat tahun selepas tuntutan itu difailkan, plaintif telah memohon untuk membuat pindaan kepada penyataan tuntutan untuk membetulkan atau meminda butir-butir cek yang telah diterima oleh plaintif daripada defendan. Majistret telah menolak permohonan itu dengan

bergantung kepada alasan bahawa tiada penjelasan untuk kelewatan empat tahun dalam membuat permohonan itu dan oleh itu permohonan itu adalah mala fide. Plaintif telah merayu.

Peguam bijaksana bagi pihak defendan telah membantah rayuan ini atas alasan bahawa: (1) memandangkan keputusan majistret merupakan satu keputusan yang tidak melupuskan hak-hak pihak-pihak, tidak ada hak untuk merayu; dan (2) afidavit sokongan Tai Kie Mei (peguam plaintif) telah gagal mematuhi A 25 k 26 Kaedah-Kaedah Mahkamah Bawahan 1980 ('KMB').

Berhubung afidavit tersebut, peguam bijaksana bagi pihak plaintif telah berhujah ia bukan satu persoalan kerana peguam plaintif telahpun diberi kuasa oleh plaintif untuk mengesahkan bagi pihak mereka dan telahpun disahkan seterusnya dalam afidavit Jong Kuet Thai, pengarah plaintif.

Diputuskan, membenarkan rayuan tersebut:

(1) Apabila seorang peguam mengesahkan sesuatu, yang tidak menimbulkan perbalahan (seperti di sini), satu-satunya perkara yang pihak bertentangan perlu bimbang adalah tentang kuasanya untuk mengesahkan. Kecuali jika ada keterangan bahawa peguam itu tiada kuasa maka tidak perlu ada kontroversi tentang afidavit itu. Di sini bukan sahaja tiada keterangan tentang ketiadaan kuasa, afidavit peguam itu telah disahkan oleh pengarah plaintif syarikat. Sewajarnya, aduan defendan berhubung afidavit itu ditolak (lihat perenggan 6).

(2) Perkataan-perkataan yang tepat dalam A 49 k 6(1) KMB adalah 'any decision other than a decision made after trial by the court' yang hanya boleh merujuk kepada perintah-perintah interlokutori. Aturan 49 k 6(1) adalah peruntukan istimewa untuk rayuan-rayuan terhadap perintah-perintah interlokutori hakim-hakim mahkamah majistret dan sesyen yang terletak pada hakim dalam kamar dan bertentangan dengan rayuan-rayuan terhadap keputusan-keputusan mahkamah bawahan selepas perbicaraan yang terletak pada hakim di mahkamah terbuka (lihat perenggan). Aturan 49 k 6(1) jelas memperuntukkan untuk suatu rayuan kepada hakim dalam kamar Mahkamah Tinggi terhadap suatu perintah interlokutori mahkamah sesyen. Memandangkan kedua-dua A 49 k 6(1) KMB dan A 56 k 1(1) Kaedah-Kaedah Mahkamah Tinggi 1980 adalah peruntukan-peruntukan istimewa, peruntukan-peruntukan tersebut hendaklah mengatasi 'decision' seperti yang ditafsirkan di bawah s 3 Akta Mahkamah Kehakiman 1964 ('AMK'), dan oleh itu, tafsiran itu tidak digunakan untuk 'decision' di bawah kedua-dua aturan tersebut (lihat perenggan 11); *Thong Guan Construction Sdn Bhd v Shencourt Properties Sdn Bhd* [2000] MLJU 685; [2001] 5 CLJ 244 diikut;*United Orix Leasing Bhd v Kilang Papan Agathis Sdn Bhd & Ors* [2003] MLJU 648; [2004] 1 CLJ 423 tidak diikut. Tambahan pula, A 49 k 6(1) yang dipinda berkuat kuasa pada bulan September 2000, iaitu selepas pindaan 1998 kepada s 3 AMK. Boleh dikatakan bahawa penggubal pindaan kepada A 49 k 6(1) sedar akan kewujudan s 3 AMK dan tidak akan memasukkan suatu kaedah, yang tidak berguna berdasarkan s 3 AMK. Bantahan awal defendan telah ditolak (lihat perenggan 14).

(3) Permohonan plaintif bukan berniat jahat dan patut dibenarkan. Dalam kes ini, plaintif hanya ingin membetulkan butir-butir tentang jumlah yang dibayar kepada mereka oleh defendan. Tiada pertikaian tentang jumlah yang telah dibayar. Plaintif mungkin dalam plidingnya terlupa mengisikan butir-butir cek dan memplidkan sejumlah RM24,500 telah dibayar oleh defendan yang sememangnya betul kerana tiada pertikaian berhubung jumlah yang telah dibayar. Meskipun lewat, permohonan itu tidak bersifat kontroversi dan tiada kesan ke atas tuntutan itu (lihat perenggan 19). Oleh itu, tiada persoalan tentang defendan diprejudiskan oleh pindaan-pindaan yang dicadangkan. Tambahan pula, tidak ditunjukkan bahawa permohonan itu satu helah taktikal oleh plaintif untuk melengah-lengahkan perbicaraan (lihat perenggan 20).]

Notes

For cases on contents of affidavits, see 2 *Mallal's Digest* (4th Ed) Consolidated Subject Index paras 337–349.

For cases on delay in applying for amendment, see 2 *Mallal's Digest* (4th Ed) Consolidated Subject Index paras 500–503.

For cases on interlocutory order, appeal, see 2 *Mallal's Digest* (4th Ed) Consolidated Subject Index paras 967–973.

Cases referred to

Director of Customs, Federal Territory v Lee Cheng Chye (liquidator of Castwell Sdn Bhd (in Liquidation) [1995] 3 CLJ 316 (refd)

Kwong Yik Bank Bhd v Ansonia Management Associates Sdn Bhd [1999] 1 MLJ 366 (refd)

Nikodo (S) Pte Ltd v GVC Karaoke Sdn Bhd [1997] 2 MLJ 742 (refd)

Ribuwajar Development Sdn Bhd v Ratus Mayar Sdn Bhd [2001] MLJU 693; [2002] 6 CLJ 56 (folld)

Syarikat Tinggan Lumber Sdn Bhd v Takang Timber Sdn Bhd [2003] 2 MLJ 465 (refd)

Thong Guan Construction Sdn Bhd v Shencourt Properties Sdn Bhd [2000] MLJU 685; [2001] 5 CLJ 244 (folld)

United Orix Leasing Bhd v Kilang Papan Agathis Sdn Bhd & Ors [2003] MLJU 648; [2004] 1 CLJ 423 (not folld)

Wright Norma v Oversea-Chinese Banking Corp Ltd (1994) 1 SLR 513 (refd)

Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors [1983] 1 MLJ 213 (refd)

Legislation referred to

Companies Act 1965 s 292
Government Proceedings Act 1956 s 10(1)
Subordinate Court Rules 1980 O 25 r 26, O 49 r 6(1)

Appeal from: Summons No 72–1322 of 2000-C (Magistrates' Court, Kuching)

Jammie Tai (Tang & Partners) for the appellant.
Derbe Tang for the respondents.

David Wong JC:

INTRODUCTION

[1] Before me is the plaintiff/appellant's (herein called plaintiff) appeal (encl 2) against the decision of the learned magistrate on 23 August 2005, disallowing the plaintiff's application to amend the statement of claim dated 9 December 2000. The proposed amendments sought after by the plaintiff are to correct or amend the details of the cheques which were received by the plaintiff from the defendant/respondent (herein called defendant).

BRIEF HISTORY OF THIS APPEAL

[2] The plaintiff filed its statement of claim dated on 9 December 2000 for a claim of RM13,000 for goods sold and delivered. Application to amend the statement of claim was only filed on 23 March 2005 some four years after the claim was filed. The magistrate dismissed the application relying heavily on the ground that there was no explanation of a delay of four years in making the application and hence a mala fide one.

PRELIMINARY OBJECTIONS

[3] From the outset, the learned counsel for defendant in her submission objected to this appeal on the ground that the magistrate's decision is not appealable and relied on the case of *Syarikat Tinggan Lumber Sdn Bhd v Takang Timber Sdn Bhd* [2003] 2 MLJ 465 and *United Orix Leasing Bhd v Kilang Papan Agathis Sdn Bhd & Ors* [2003] MLJU 648; [2004] 1 CLJ 423. The other objection relates to the affidavit in support of Tai Kie Mei affirmed on 17 March 2005 ('the affidavit') for failing to comply with O 25 r 26 of the Subordinate Court Rules 1980 ('the SCR').

[4] Learned counsel for the plaintiff in her written submission rebuts the aforesaid argument by relying on the case of *Nikodo (S) Pte Ltd v GVC Karaoke Sdn Bhd* [1997] 2 MLJ 742, *Kwong Yik Bank Bhd v Ansonia Management Associates Sdn Bhd* [1999] 1 MLJ 366 and O 49 r 6(1) of the SCR. In respect of the affidavit, learned counsel for the plaintiff submits it is a non issue as the plaintiff's solicitor has been duly authorized by the plaintiff to affirm on their behalf and has been further confirmed in the affidavit of Jong Kuet Thai, a director of the plaintiff.

[5] I deal first with the alleged affidavit which relates to O 25 r 26 of the SCR which states as follows:

> 26. Contents of affidavit.
>
> (1) Subject to paragraph (2) of this rule and to any order made under rule 3, an affidavit may contain only such facts as the deponent is able of his own knowledge to prove.
>
> (2) An affidavit sworn for the purpose of being used in interlocutory proceedings may contain statements of information or belief with the sources and grounds thereof.

[6] Without wasting too much time on this, let me say when a solicitor affirms something, which is not contentious (as was here), the only thing the opposing side has to worry about is his authority to affirm. Unless there is evidence that the solicitor has no authority there should be no controversy about the affidavit. Here not only there is no evidence of a lack of authority, the solicitor's affidavit was confirmed by a director of the plaintiff company. Accordingly, I dismiss the defendant's complaint on the affidavit.

[7] I deal now with the issue of whether or not this appeal is non starter. For this issue, the first case to look at would be *Syarikat Tingan Lumber Sdn Bhd v Takang Timber Sdn Bhd* which is a decision of the Court of Appeal which defined the word 'decision' appearing in s 3 of the Court of Judicature Act 1964 (came into force on 1 August 1998 vide s 2 of the Courts of Judicature (Amendment) Act 1998) which reads as follows:

> 'decision' means judgment sentence, or order, but does not include any ruling made in the course of a trial or hearing of any cause or matter which does not finally dispose of the rights of parties.

[8] His Lordship PS Gill JCA (as he then was) delivering the judgment of the Court of Appeal stated as follows (at pp 501–502):

> On hindsight, we feel that this entire exercise on the interpretation of the meaning of a final order, and an interlocutory order was needless, and the case law that was tendered irrelevant. This is simply because one needs to merely look at the cold print of s 3 CJA as amended, to see that any ruling made in the course of a trial or hearing of any cause or matter, which does not finally dispose the rights of the parties, does not constitute a decision for the purpose of s 3 CJA, as amended. This is the stark reality of s 3 CJA as amended. It is simply, and lucidly stated leaving no room for doubt in its application. The intention of the legislature when drafting the amendment was that, the amendment should serve as a filter process for appeals.
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> What we feel, however, must be emphasized, with equal force when scrutinizing s 3 CJA as amended, is that, the said ruling must be made in the course of a trial, or hearing. Much emphasis, we feel, is placed on the latter part of the sentence viz-a-viz '… does not finally dispose of the rights of the parties', thus overlooking the fact that the ruling must be made in the course of a trial or hearing of any cause or matter. Counsel we found appeared to be preoccupied with the determination of whether the ruling disposes the rights of the parties, but paid scant regard to the fact as to at what juncture the said ruling was made.
>
> Equal weight should be attached to the entire sentence of s 3 CJA as amended, for what must be asked, is not only whether a ruling does not dispose the final rights of the parties but also the question whether it was a ruling made in the course of a trial or hearing, of any cause or matter. If it was not a ruling made in the course of a trial or matter, regardless of the fact that it did not dispose of the rights of the parties, it may not be excluded by the definition of 'decision' as provided in s. 3 of the CJA as amended, and is therefore appealable.

[9] Learned counsel for the defendant argues that since the decision of magistrate is a decision which does not finally dispose the rights of the parties there is no right of appeal.

[10] If I were to agree with the approach of the learned counsel for the defendant, it would in effect mean that there is no appeal at all against interlocutory decisions by the subordinate courts. This appears to be in direct contradiction to O 49 r 6(1) which reads as follows:

> (1) Notwithstanding anything contained in this Order, an appeal from any decision other than a decision made after trial by the Court shall lie to a Judge in Chambers of the High Court.

[11] The operative words in my view here are 'any decision other than a decision made after trial by the court' which can only refer to interlocutory orders, O 49 r 6(1) is a special provision for appeals against interlocutory orders of magistrates and sessions court judges which is to lie to a judge in chambers as opposed to appeals against decisions of the subordinate courts after trial which is to lie to a judge in open court. The learned judge in *Thong Guan Construction Sdn Bhd v Shencourt Properties Sdn Bhd* [2000] MLJU 685; [2001] 5 CLJ 244 expressed the following view on O 49 r 6(1):

> With great respect, I am unable to agree with the learned judge, simply because O 49 r 6(1) of the Subordinate Courts Rules 1980 (the SCR) obviously provides for an appeal to a judge in chambers of the High Court against an interlocutory order of the sessions court.
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> Order 49 r 6(1) of the SCR states:
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> > Notwithstanding anything contained in this Order, an appeal shall lie to a Judge in Chambers from any decision made by the Court other than a decision made after trial. However, the above provision has since been amended vide PU(A) 343/2000, which came into effect from 22 September 2000, and it states very clearly:
> >
> > > Notwithstanding anything contained in this Order, an appeal from any decision other than a decision made after trial by the Court shall lie to a Judge in Chambers of the High Court.
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> Unfortunately, in that case, the learned judge did not appear to have considered that provision which, I think, is clearly applicable to the appellant's appeal as the appeal was against the interlocutory order of the sessions court, ie, dismissing the appellant's application to strike out the respondent's defense without trial. In the present case, the appeal before the High Court was from the decision of the SAR of the High Court by virtue of O 56 r 1(1) of the RHC which specifically provides for an appeal to a judge in chambers from any judgment, order or decision of the registrar. Since both O 49 r 6(1) of (he SCR and O 56 r 1(1) of the RHC are special provisions, I feel their provisions must prevail over the 'decision' as defined under s 3 of the Act, and as such, the definition has no application to the 'decision' under those two orders.

[12] The aforesaid judgment was not followed by the learned judicial commissioner in *United Orix Leasing Bhd v Kilang Papan Agathis Sdn Bhd & Ors* [2003] MLJU 648; [2004] 1 CLJ 423 where he sets out his reason as follows:

> Finally, I have to consider the apparent inconsistency or conflict between the provision of O 49 r 6 SCR and the exclusion clause in the definition of 'decision' in s 3 of the CJA as amended. This is resolved by relying on s 4 of the CJA which is reproduced below:

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> In the event of inconsistency or conflict between this Act and any other written law other than the constitution in force at the commencement of this Act, the provision of this Act shall prevail. For that reason and with great respect, I beg to differ with the learned judge in *Thong Guan Construction Sdn Bhd v Shencourt Properties Sdn Bhd* [2000] MLJU 685; [2001] 5 CLJ 244 where it was held that O 49 r 6(1) prevails over the definition of 'decision' under s 3 of the CJA as amended.

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[13] With great respect, in my view it is not so much one legislation prevailing over the other. It is more of constructing legislation in its context. In *Director of Customs, Federal Territory v Lee Cheng Chye (liquidator of Castwell Sdn Bhd (in Liquidation)* [1995] 3 CLJ 316, the Supreme Court was faced with two conflicting legislations, namely s 10(1) of the Government Proceedings Act 1956 and s 292 of the Companies Act 1965. The Supreme Court confronted the dilemma in the following way:

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> Where there are two conflicting provisions of the Legislature and the question arises which of the two should govern the case, it is the Court's duty to see the terms of which provisions are more appropriate in the circumstance of the case. The principle of linguistic cannons of construction on the use of legal maxim may provide the answer to our case.
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> The relevant maxim in the present appeal is *generalia specialibus non derogant* — general statements or provisions do not derogate from special statements or provisions, or conversely, *specialia derogant generalibus* — special provisions derogate from general. The Government Proceedings Act 1956 was enacted to provide generally the rights of the Government to sue, its liability, jurisdiction and procedure. Section 10(1) provides in a non specific and general terms that all debts due and claims owing to the Government shall enjoy preferential payments over other competing debts or claims which arise subsequent to the date of accrual of such Government claim. The phrases 'all debts due'; 'claims of every kind'; 'from such persons to any other person whomsoever' are plainly general words and general words are to be understood generally — *generalia verba sunt generalita intelligenda*.
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> In contrast, ss 291 and 292 of the Companies Act 1965 are special provisions dealing with a subject distinctive to companies. They relate to the respective rights of secured and unsecured creditors in a \/vinding-up of an insolvent company and make express mention of federal tax (which by virtue of s 23 of the Sales Tax Act or other related legislation is a debt due to the Government) as ranking sixth in the list of priority amongst other unsecured preferential debts. We have no hesitation in holding that s 292(1) of the Companies Act 1965 is a special provision dealing with a particular subject and that it is in conflict with s 10(1) of the Government Proceedings Act 1956. Nevertheless we must also assume that the Legislature must have had in mind the latter act when enacting the subsequent Companies Act 1965 and did not intend to abrogate it altogether. The general rule of construction is such if having made the general act the Legislature afterwards makes a special provision in conflict with the earlier legislation the special provision so in conflict is treated as a mere exception to the general provision — *Corporation of Madras v Electric Tramways Ltd* AIR 1931 Madras 152, 156 wherein Reilly J remarked:
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> > If the special Act is made after the general Act, the position is even simpler. Having made the general Act if the Legislature afterwards makes a special Act in conflict with it, we must assume that the Legislature had in mind its own General Act when it made the special Act, and made the special Act which is in conflict with the general Act, as an exception to the general Act. Where there was a conflict between s 27 of the Evidence Act 1872 and s 162 of Criminal Procedure Code 1898, as amended in 1923 (s 162 of Act No 2 of 1974), Din Mohammad J, opined in *Hakam Khudayar v Emeror* AIR 1940 Lah 129, 152 (at pp 324–325).

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[14] The amended O 49 r 6(1) came into effect in September 2000, which is after the 1998 amendment to s 3 CJA. One can safely assume that the framers of the amended O 49 r 6(1) were aware of the existence of s 3 CJA and would not put in a rule, which would be useless in the face of s 3 CJA. Applying the principle used in the Supreme Court, I concur with the construction given by learned judge in *Thong Guan Construction Sdn Bhd v Shencourt Properties Sdn Bhd*. For the forgoing reason, I dismiss the defendant's preliminary objection.

APPEAL PROPER

[15] To recap, the plaintiff wanted to amend the details (numbers and name of bank) of the cheques set out in the statement of claim.

[16] The principles of law on amendment are settled and suffice for me just to refer to the case of *Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors* [1983] 1 MLJ 213 where his Lordship Mohamed Azmi FJ said this (at pp 214–1215):

> Under O 20 of the Rules of the High Court 1980, which is equivalent to O 28 of the Rules of Supreme Court, a judge has a discretion to allow leave to amend pleadings. Like any other discretion, it must of course be exercised judicially (see *Kam Hoy Trading v Kam Fatt Tin Mine* [1963] MLJ 248. The general principle is that the court will allow such amendments as will cause no injustice to the other parties. Three basic questions should be considered to determine whether injustice would or would not result, (1) whether the application is bona fide; (2) whether the prejudice caused to the other side can be compensated by costs and (3) whether the amendments would not in effect turn the suit from one character into a suit of another and inconsistent character. (See *Mallal's Supreme Court Practice* p 342). If the answers are in the affirmative, an application for amendment should be allowed at any stage of the proceedings particularly before trial, even if the effect of the amendment would be to add or substitute a new cause of action, provided the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the original statement of claim. In this appeal it is unfortunate that the learned judge had failed to set out anywhere in the appeal records the factor or factors which he had taken into consideration in the exercise of his discretion to dismiss the appellants' application. We must therefore review the application afresh.

[17] Now, the defendant says that the application was not made in good faith as there had been a long delay and it was not just a mere typing mistake. Further the defendant alleges that it had suffered prejudice, which could not be compensated by costs.

[18] For the plaintiff, it is submitted that the main purpose for the amendment is to accurately set out the details of the amount paid, that is the sum of RM24,500.00 which is not a subject of dispute between the parties. Learned counsel for the plaintiff further submits that is trite law that an amendment which would enable the real issues between the parties to be tried should be allowed subject to penalties on costs and adjournment, if necessary, unless the amendment would cause injustice or injury to opposing party which could not be compensated for by costs or otherwise. This is so even though the omission was caused by careless or the application for amendment

was made very late in the day and relied on the case of *Wright Norma v Oversea-Chinese Banking Corp Ltd* (1994) 1 SLR 513.

[19] Having read learned counsels' respective written submissions and having taken into account the explanation given in the affidavits in support of the application, I am of the view that the plaintiff's application is not one of bad faith and ought to be allowed.

[20] In this case, the plaintiff merely wanted to correct the details of the amount paid to them by the defendant. There was no dispute to the amount paid. Plaintiff could have in its pleadings left out the details of the cheques and pleaded a sum RM24,500 had been paid by the defendant which in my view would have been proper as there is no dispute to the amount paid. Late as it may be, the application was not a controversial one and had no effect on the claim itself. Why the respondent's counsel objected to the oral application by the appellant's counsel is hard to understand. It did not change the characters of the suit. Nor did it require the defendant to change his preparation for the case. As pointed out by Richard Malanjum J (as he then was) in *Ribuwajar Development Sdn Bhd v Ratus Mayar Sdn Bhd* [2001] MLJU 693; [2002] 6 CLJ 56, the burden lies on the defendant to establish that it would suffer prejudice as a result of the amendment by reason of having to get new witnesses which may not be available or that it would have difficulty in recalling events. The defendant had not shown me the prejudice, which they would suffer. The amount of the plaintiff's claim has not changed. It is only the details of the undisputed amount paid that have been changed. Thus, there is no question of the defendant being prejudiced by the proposed amendments. Further, it has not been shown to me that the application was a tactical ploy by the plaintiff to delay the trial. In *Ribuwajar Development Sdn Bhd v Ratus Mayar Sdn Bhd*, Richard Malanjum J (as he then was) held that to constitute bad faith, the application must be a tactical ploy to delay the trial.

[21] Accordingly, I allow this appeal. As for costs, I will make no order as I am of the view that both counsels should take some blame. One for making the application at such a late stage, while the other for objecting.

Appeal allowed.

Reported by Loo Lai Mee